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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1952~~ 1953

No. ~~535~~ 13

POPE & TALBOT, INC.

Petitioner

vs.

CHARLES HAWN

and

HAENN SHIP CEILING AND REFITTING CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

MARK D. ALSPACH,
Counsel for Petitioner.

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Section 2101 5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 535

POPE & TALBOT, INC.

Petitioner

vs.

CHARLES HAWN

and

HAENN SHIP CEILING AND REFITTING CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Pope & Talbot, Inc. respectfully prays that a writ of certiorari may issue out of this Court to review the judgments of the United States Court of Appeals for the Third Circuit entered on August 27, 1952, in appeals docketed in said Court as No. 10,613 (appeal by the respondent Haenn Ship Ceiling and Refitting Corporation herein) (Rh 71) *

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* The record in this case consists, inter alia, of the Appendix in the Court below in Appeal No. 10,639, which shall hereafter be referred to

and No. 10,630 (appeal by the petitioner herein) (Rh 72), both of which judgments were amended on November 3, 1952 (Rh 97, 98).

Summary and Statement of Matter Involved

This is a civil action brought by respondent Charles Hawn (hereinafter referred to as "Hawn") against petitioner, Pope & Talbot, Inc. (hereinafter referred to as "Pope & Talbot"), to recover damages for personal injuries sustained aboard Pope & Talbot's vessel "John Dickinson." Hawn was a foreman ship carpenter employed by an independent contractor, the respondent Haenn Ship Ceiling and Refitting Corporation (hereinafter referred to as "Haenn"). Hawn was injured while engaged in effecting certain alterations and repairs to the vessel's grain fittings while the vessel was berthed at a pier in Philadelphia, Pennsylvania on November 16, 1947.

Hawn brought his suit in the United States District Court for the Eastern District of New York (Rp 7a). He alleged jurisdiction upon the basis of diversity of citizenship (Rp 7a, 8a). Pope & Talbot having attacked the propriety of venue, the action was subsequently transferred to the United States District Court for the Eastern District of Pennsylvania (Rp 11a). Pope & Talbot brought in Haenn as a third-party defendant, claiming recovery over against Haenn by way of contribution or indemnity (Rp 13a). Pope & Talbot likewise brought in Atlantic and Gulf Stevedores, Inc. as a third-party defendant, but the action as to Atlantic and Gulf was dismissed prior to trial by stipulation (Rp 25a).

The case was tried to a jury, which returned a special

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by the symbol "Rp", and the Appendix in the Court below in Appeal No. 10,613, which shall hereafter be referred to by the symbol "Rh". The record printed subsequent to the aforesaid Appendices is bound following the latter Appendix, and shall likewise be referred to by the symbol "Rh".

verdict in favor of Hawn and answered certain interrogatories. The jury assessed Hawn's damages "without consideration of contributory negligence" at $36,000.00 (Rp 180a-182a). The jury also found that Pope & Talbot's vessel was unseaworthy; that both Pope & Talbot and Haenn were negligent; and that Hawn's own negligence contributed to his injuries to the extent of 17½ per cent (Rp 180a-181a).

All of the parties filed post-trial motions. Pope & Talbot moved, inter alia, for entry of judgment in its favor, and against Hawn, on the ground that the latter's contributory negligence barred recovery. In the alternative, Pope & Talbot moved that Hawn's judgment against it be in the sum of 50 per cent of the damages assessed. Pope & Talbot further moved for judgment in its favor and against Haenn in the full amount of any judgment in favor of Hawn and against Pope & Talbot, or in the alternative, that judgment be entered in Pope & Talbot's favor, and against Haenn in the sum of one-half of any judgment entered in favor of Hawn and against Pope & Talbot (Rp 185a).

Haenn moved, inter alia, for judgment in its favor, and against Pope & Talbot (Rp 183a).

The District Court disposed of the various motions by opinion dated July 17, 1951. The District Court held that Judgment should be entered in favor of Hawn and against Pope & Talbot in the sum of $29,700.00 representing the amount of Hawn's damages diminished by 17½ per cent, the percentage of his contributory negligence as found by the jury. The District Court further held that Haenn should contribute to Pope & Talbot the sum of $14,850.00, unless the limit of Haenn's liability to Hawn under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. §901 *et seq.* should be a smaller amount, in which

event the smaller amount was to be the measure of Haenn's contribution to Pope & Talbot (Rp 192a).

After a further hearing, the District Court on September 28, 1951 entered judgment in favor of Hawn and against Pope & Talbot in the sum of $29,700.00, and in favor of Pope & Talbot and against Haenn in the amount of $8,331.35, the latter sum representing the stipulated limit of Haenn's liability to Hawn under the Compensation Act. The judgment contained a proviso granting leave to Haenn to move for modification of the judgment against it "should it hereafter appear that for any reason it may be relieved from paying the full limit of its obligation for compensation under the Longshoremen's and Harbor Workers' Act" (Rp 202a).

Both Pope & Talbot and Haenn appealed to the Court of Appeals for the Third Circuit. Pope & Talbot's appeal, docketed as No. 10,630, attacked (1) the judgment in favor of Hawn and against Pope & Talbot and (2) the amount of the judgment in favor of Pope & Talbot and against Haenn. Haenn's appeal, docketed as No. 10,613, attacked the judgment entered against it and in favor of Pope & Talbot.

The appeals were heard and decided together. In its opinion by Judge McLaughlin dated August 27, 1952, the Court of Appeals held that the principle of comparative negligence applied, and sustained Hawn's $29,700.00 judgment against Pope & Talbot. The Court also rejected Pope & Talbot's alternative contention that Hawn's recovery should be reduced by the amount of payments which Haenn was obliged to pay to Hawn under the Longshoremen's and Harbor Workers' Compensation Act. Finally, the Court held that Pope & Talbot could recover nothing from Haenn (Rh 58).

The judgments of the Court of Appeals were entered on

August 27, 1952 (Rh 71, 72). Pope & Talbot filed a petition for rehearing in its appeal (Rh 77), which was denied on October 8, 1952 (Rh 93). On November 3, 1952, the Court amended the final paragraph of its opinion, which contained only the decretal language, to conform with the sense of the opinion (Rh 96). The judgments were correspondingly amended on November 3, 1952 (Rh 97, 98).

Jurisdiction

The judgments of the Court of Appeals were entered on August 27, 1952 (Rh 71, 72). Petitioner's petition for rehearing in No. 10,630 was denied on October 8, 1952 (Rh 93). Amended judgments in both appeals were entered on November 3, 1952 (Rh 97, 98).

Uncertain as to whether, for purposes of computing the time within which to file a petition for certiorari the judgments of the Court of Appeals had become final prior to October 8, 1952, petitioner obtained an extension of time within which to file the present petition until January 6, 1953, by order of Mr. Justice Burton dated November 18, 1952.

The jurisdiction of this Court to entertain this petition and to grant the same is provided in § 1254 (1) and § 2101 (c) of Title 28, United States Code.

Opinions Below

The opinion of Judge McGranery of the United States District Court for the Eastern District of Pennsylvania, filed July 17, 1951 (Rp 192a) is reported at 99 F. Supp. 226. Judge McGranery's supplemental opinion, embodying the entry of judgment, filed September 28, 1951 (Rp 202a) is reported at 100 F. Supp. 338. The opinion of Circuit Judge McLaughlin of the United States Court of Appeals

for the Third Circuit, filed August 27, 1952 (Rh 58) is reported at 198 F. 2d 800.

Questions Presented

1. An employee of an independent contractor sustained injuries while working aboard a ship docked upon navigable waters within the territorial jurisdiction of a state under whose internal law contributory negligence bars recovery. He used the shipowner on the civil side of the District Court under its diversity of citizenship jurisdiction. May the plaintiff recover, notwithstanding the jury's finding that he was contributorily negligent? If so, does plaintiff's contributory negligence result in recovery of half of the damages assessed by the jury, or does it result in recovery of the damages assessed diminished only by the percentage that a jury may find represents the quantum of negligence which plaintiff contributed to his own injury?

2. Pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. §901 *et. seq.*, the plaintiff's employer had made certain payments to the plaintiff. Under an agreement to which the shipowner is not a party, the plaintiff is to repay the employer, out of his recovery against the shipowner, all sums paid to him by the employer under the compensation Act. The jury found that the employer's negligence had contributed to the plaintiff's injuries. The shipowner, held liable to the plaintiff, was denied any recovery from the employer. In these circumstances, should not the plaintiff's recovery against the shipowner be reduced to the extent of the payments made by the employer to the plaintiff, thus preventing either (1) double recovery by the plaintiff, or (2) indemnification of the negligent employer at the expense of the shipowner?

3. Is the warranty of seaworthiness owing by a shipowner to employees of a stevedore under *Seas Shipping*

Company v. *Sieracki*, 328 U. S. 85, likewise owing by a shipowner to an employee of a carpentry contractor engaged in alterations and repairs to a vessel's fittings?

Reasons Relied Upon For Allowance of the Writ

All of the questions here presented are of intense practical importance. None has ever been squarely decided by this Court. As to each, authoritative clarification of the law would be highly beneficial not only to the diverse maritime interests concerned with this particular litigation, but to all others similarly situated. In everday litigation, the incidence of recurrence of these problems is high. Certainty as to the rules of law governing their solution is necessary. For these reasons alone, the decision below merits review by this Court.

There are additional reasons peculiar to each of the questions presented which demonstrate the desirability for review by this Court. These reasons will be discussed in conjunction with the separte questions to which they pertain.

I. The Question as to the Effect of Contributory Negligence

This is an action at law. Hawn invoked the jurisdiction of the District Court on the ground of diversity of citizenship. The Court was sitting in Pennsylvania, in whose territorial waters the tort giving rise to the cause of action was committed. Under Pennsylvania law, contributory negligence bars recovery in personal injury suits. *Fordyce* v. *White Star Bus Lines*, 304 Pa. 106; *Parris* v. *John B. Kelly, Inc.*, 321 Pa. 78; *Glancy* v. *Meadville Bread Co.*, 340 Pa. 452. Although no Pennsylvania case has decided the effect of contributory negligence in a personal injury suit based upon maritime tort, in other instances of tort committed upon navigable waters, Pennsylvania has held that

contributory negligence bars recovery in an action at law. *Simpson* v. *Hand*, 6 Wharton 311; *Brown* v. *Gilmore*, 92 Pa. 40.

The Court below invoked what it termed the principle of comparative negligence. As we shall presently observe, "comparative" negligence, applied to the jury's findings in this case, is a misnomer. Passing that for the moment, the fact remains that in refusing to apply the rule that contributory negligence bars recovery, the Court below reached a result which fails to give effect to applicable decisions of this Court, and is in conflict with the Court of Appeals for the Ninth Circuit, and with various state courts of last resort.

Atlee v. *Packet Co.*, 88 U. S. 389, and *Belden* v. *Chase*, 150 U. S. 674, established that in cases of maritime tort sued upon at law, contributory negligence bars recovery. While these cases involved damage to vessels, nothing in their basis or reasoning suggests or justifies a valid distinction between personal injury and property damage suits.

The Court below recognized that *Atlee* and *Belden* "strongly support" petitioner's position, but felt that these cases "no longer reflect the opinion" of this Court (at 198 F. 2d 806). The cases relied on by the Court below in essaying this opinion do not justify it. They involve either the recognition, at law, of a ground of recovery theretofore thought to be peculiar to the admiralty: *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; or the rights of seamen, as to whom Congress has bestowed special benefits in voluminous legislation, such as the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688: *Garrett* v. *Moore-McCormack Lines, Inc.*, 317 U. S. 239; *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255; *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372.

This case does not involve the rights of a seaman, bound to the vessel by shipping articles. Rather, it concerns the

rights of a workman bound only to his shore-based employer, casually aboard the vessel to perform a specialized task. Upon Hawn, and others of his class, Congress has not conferred the right to recover damages against third parties irrespective of contributory negligence. Nor is the right of an employee of a contractor to recover damages from the owner of premises upon which he is working in any sense peculiar to the admiralty.

In *Puget Sound Navigation Co.* v. *Nelson*, 41 F. 2d 356, the Court of Appeals for the Ninth Circuit, following *Belden* v. *Chase*, supra, held that in an action at law for personal injuries and property loss arising out of maritime tort, contributory negligence bars recovery.

In *Sea Products Company* v. *Puget Sound Nav. Co.*, 191 Wash. 276, 71 P. 2d 43, and *Wilkins* v. *Foss Launch & Tug Co.*, 20 W. 2d 422, 147 P. 2d 524, the Supreme Court of Washington likewise followed *Belden*, and held that in an action at law, contributory negligence barred recovery for property damage arising from collision upon navigable waters. Consonant with *Belden* are also *Maleeny* v. *Standard Shipbuilding Corp.*, 237 N. Y. 250, and *Proctor* v. *Dillon*, 235 Mass. 538. The conflict of the decision below with the foregoing cases is apparent.

To the extent that the Court below refused to follow the Pennsylvania rule as to the effect of contributory negligence in an action at law, it failed to apply, where it should have, this Court's decision in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, as further explained in *Angel* v. *Bullington*, 330 U. S. 183, wherein this Court said that the *Erie* decision

> ". . . drastically limited the power of federal district courts to entertain suits in diversity cases that could not be brought in the respective State courts *or were barred by defenses controlling in the State courts* . . ."
> (at 330 U. S. 192; emphasis supplied).

It begs, rather than analyzes the question to state, as did the Court below (at 198 F. 2d 807) that a "strictly federal principle" permits recovery irrespective of contributory negligence. It serves only to confuse the issue to transmute and enlarge the express exceptions to the *Erie* v. *Tompkins* doctrine—"matters governed by the Federal Constitution or by acts of Congress" (at 304 U. S. 78)—into a loosely defined category denominated "federal principle." We are not here dealing with a right granted by the Federal Constitution, or by an act of Congress. Jurisdiction was invoked upon the ground of diversity of citizenship, nor could it have been supported under the District Court's "federal question" jurisdiction, 28 U. S. C. § 1331: *Jordine* v. *Walling*, 185 F. 2d 662, 668 (C. A. 3); *Mullen* v. *Fitz-Simons & Connell Dredge & Dock Co.*, 191 F. 2d 82 (C. A. 7), cert. den., 342 U. S. 888. Thus there is also inherent in the present decision the question of the power, in a jurisdictional sense, of the District Court to grant the relief which it gave.

In refusing to apply the Pennsylvania law, the Court below acted contrary to the view expressed in *Caldarola* v. *Eckert*, 332 U. S. 155, 158, where this Court, dealing with a stevedore's personal injury suit arising on New York waters, said:

> ". . . In any event, whether New York is the source of the right or merely affords the means for enforcing it, here determination is decisive that there is no remedy in its courts for such a business invitee against one who has no control and possession of premises."

The Court below (at 198 F. 2d 806-807) distinguished *Caldarola* on the ground that it turned on whether it was the state of New York's duty to accept the federal claim involved, not on whether a state statute controlled and thus

wiped out a fundamental admiralty right." Petitioner challenges this statement, but we need not labor the point, for the fact remains that in *Caldarola*, this Court approved the disposition of the issues, both factual and legal, by the New York court in accordance with its own law. The only facet of the case which was held to be of "federal concern" was the interpretation of a contract of general agency to which the United States was a party.

That *Caldarola* involved the same issues as the present case is indicated by Mr. Justice Rutledge's dissent, wherein he stated that New York law had nothing to do with creating or nullifying the "substantive right" of the plaintiff which, in his view, was founded in "federal law" (at 332 U. S. 164). This is precisely the view expressed by the Court below in the present case.

The decision below is likewise at variance with the recent decision of this Court in *Halcyon Lines* v. *Haenn Ship Ceiling Corp.*, 342 U. S. 282. In *Halcyon*, a case involving maritime personal injury, this Court disallowed contribution between joint tortfeasors. It referred to the abolition of the defense of contributory negligence as between employer and employee under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U. S. Code § 901 *et seq.*, as an inroad on traditional tort law, and refused to make further inroads by way of allowing contribution in a field where Congress has legislated extensively, but stopped short of approving contribution. Congress has not abolished the defense of contributory negligence as between a ship carpenter such as Hawn, and a third party such as petitioner. Furthermore, if in maritime personal injury cases community of fault as between joint tortfeasors does not result in contribution, but leaves the damages where they were sustained, scant logic supports a contrary result

where the partners in fault stand in the relation of plaintiff and defendant.

Even if the Court below were correct in treating this case as though it had been brought in admiralty, nevertheless in attempting to apply the rule of comparative negligence, it misconstrued this Court's decision in *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424, and reached a result which is in conflict with decisions by four other Courts of Appeals.

The Court below cited the *Smith* case for the proposition that comparative negligence is "Unquestionably . . . the admiralty doctrine" (at 198 F. 2d 807). The *Smith* case holds no such thing. It deals solely with the rights of a seaman crew member in a suit against his employer, in which instance Congress has prescribed the rule of comparative negligence in the Jones Act, 41 Stat. 1007, 46 U. S. Code § 688.

The rule applied in suits in admiralty is that a contributorily negligent libellant can recover one-half of his damages in a personal injury suit brought by a maritime worker other than a seaman. It has been so held by the Court of Appeals for the Fifth Circuit in *The Granville R. Bacon*, 229 Fed. 715, and *The Wilhelmina*, 232 Fed. 430; by the Court of Appeals for the First Circuit in *The Steam Dredge No. 1*, 134 Fed. 161; and by the Court of Appeals for the Sixth Circuit in *Pioneer S. S. Co.* v. *McCann*, 170 Fed. 873.

The Court of Appeals for the Second Circuit recently applied the admiralty rule in a suit for property damage occasioned by negligence on navigable waters, brought under the diversity jurisdiction of the District Court; *W. E. Hedger Transp. Corp.* v. *United Fruit Company*, 198 F. 2d 376, cert. den. — U. S. — (No. 388, October Term, 1952). In this connection, it is important to note that the Court in *Hedger* adverted to the fact that the New York courts would look to the admiralty rule to determine the effect of con-

tributory negligence (at 198 F. 2d 379), whereas Pennsylvania courts do not, as was noted previously. The *Hedger* case held that the contributorily negligent plaintiff could recover one-half of his damages. This case does not even discuss the possibility of applying the rule of comparative negligence.

Finally, the rule as to the effect of contributory negligence applied by the Court below is unsound on still another score. The rule is said to be comparative negligence, but upon closer inspection, it is not that at all.

Comparative negligence implies that each party to a casualty is answerable for the percentage of fault which he contributed to it. Here the jury found that Hawn, Pope & Talbot and Haenn all contributed to Hawn's injuries. In these circumstances, the fault of Hawn, and that of Pope & Talbot is not "compared," and reflected in dollars, simply by deducting from the recovery the percentage of the damages represented by the quantum of fault which Hawn contributed, and making Pope & Talbot pay the rest. This procedure rather compares the fault of Hawn with the combined fault of Pope & Talbot and Haenn, and makes Pope & Talbot responsible for all of the latter.

The principle of comparative negligence is fair and workable, and may be accurately expressed in terms of percentage-wise diminution of the plaintiff's recovery where, almost by definition, only plaintiff and defendant participate in the operative facts arising out of work being done by the former on the latter's property or premises. For example, there are those instances where Congress has granted an employee the right to sue his employer, and have his damages assessed by comparative negligence: the Jones Act, 41 Stat. 1007, 46 U. S. Code § 688; and the Federal Employers' Liability Act, 35 Stat. 65, 45 U. S. Code § 51 *et seq.* But where, as here, the usual factual situation embraces acts

or omissions of the plaintiff, his employer, and the third party on whose premises the work is being performed, and all contribute to the casualty, it is basically unfair to assess the plaintiff only with the percentage of his fault, and to assess the third party for all of the rest.

For all of the foregoing reasons, it is desirable and necessary that this Court review the fundamental question of the effect of contributory negligence under the circumstances here presented.

II. The Question as to Whether Hawn's Recovery Against Petitioner Should Be Reduced by the Sums Paid to Hawn by Haenn Under the Compensation Act.

Hawn's employer, Haenn, had made payments aggregating $5,881.35 to Hawn, or on his behalf, under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 52 Stat. 1164, 33 U. S. Code § 901 *et seq.* The stipulated limit of Haenn's ultimate liability to Hawn under the Act is $8,331.35. Under an agreement to which petitioner is not a party, Hawn is to repay Haenn the sums which Haenn paid him out of his recovery against petitioner (Rp 202a, Rh 69).

The Court below rejected petitioner's contention that Hawn's recovery against it be reduced by the sums paid by Haenn to Hawn. In so doing, the Court below, in deciding a question of first impression, has judicially amended the Compensation Act in a manner neither approved nor required by this Court's decision in *Halcyon Lines* v. *Haenn Ship Ceiling Corp.*, *supra*, 342 U. S. 282. It also construed the Compensation Act on a fundamental point in a manner inconsistent with the purpose of the Act.

Hawn's damages were assessed by the jury under a charge which instructed them to include past loss of wages and medical expenses in computing the recovery (Rp

156a). If Hawn were permitted to retain this recovery, in addition to the compensation received from his employer, he would be obtaining a double recovery. Hawn did not urge his entitlement thereto, nor does the Compensation Act permit an employee to retain both compensation and damages from responsible third parties. *The Etna*, 138 F. 2d 37, 40 (C.A. 3).

If, on the other hand, the injured employee reimburses his employer for Compensation Act payments out of his recovery against the third party, no injustice is worked provided the employer's own fault did not contribute to his employee's injury. But here, as the Court below noted in another connection, the "plain inference" is that Haenn and petitioner "were found to be concurrently and equally at fault" (at 198 F. 2d 807). The decision below permits the negligent employer, although insulated from liability for contribution to the shipowner, to secure full indemnity from the shipowner, with the employee the conduit for recovery.

Nothing in the Compensation Act contemplates this result. The Act provides for subrogation in the employer only in cases where payment of compensation was resisted, but directed by an award in a compensation order filed by the Deputy Commissioner. § 33, 44 Stat. 1440, as amended, 52 Stat. 1168, 33 U. S. Code § 933. In these circumstances, the employee's right of action against the third party passes to the employer, who repays himself out of the proceeds of his suit against the third party.

Under no other circumstances does the Compensation Act provide for subrogation in favor of the employer. Where the employer's own fault is not involved, it has been held that he is entitled to subrogation to his employee's recovery, under equitable principles. *The Etna, supra*, 138 F. 2d 37. Until the present decision, no Court has, to petitioner's

knowledge, suggested or held that a negligent employer possesses the same right.

The Court below said that petitioner's contention is an attempt to accomplish by indirection the result repudiated in *Halcyon Lines* v. *Haenn Ship Ceiling Corp.*, *supra* (at 198 F. 2d 807). It reasoned that *Halcyon* prevents recovery of contribution by one joint tortfeasor against another, and that the effect of petitioner's contention would be to force Haenn's contribution to Hawn's judgment against petitioner. However, it is evident that the result sanctioned by the Court below is doubly offensive to *Halcyon*, for it permitted Haenn, a joint tortfeasor to secure not merely contribution, but full indemnity from another joint tortfeasor, the petitioner. If *Halcyon* prevents petitioner from securing contribution from Haenn, even more must it prevent Haenn from indemnifying itself at petitioner's expense.

Haenn was obliged to make compensation payments to Hawn by law, regardless of fault on anyone's part. The Compensation Act does not permit Haenn to recoup these payments, and fundamental concepts of fairness prevent such a result. In petitioner's view, the only way in which the compensation payments may be treated, so as to give effect to the purpose of the Compensation Act and to this Court's decision in the *Halcyon* case, is to permit Hawn to retain the compensation payments, and reduce the amount of his judgment against petitioner to that extent. Thus preventing the negligent employer from recovering that which it was legally obligated to pay from the third party who was similarly denied any recovery from the employer.

In rejecting petitioner's contention, the Court below has in effect construed the Compensation Act as creating in a negligent employer a right to fully recover from the negligent third party compensation already paid by the employer to its employee. Thus the burden of the injured employee

is made to weigh inevitably and exclusively upon the third party who happens to contribute to the injury of one within the Act.

The basic injustice of the result which the Court below sanctioned becomes even more apparent, should Hawn be permitted to recover all of the damages assessed by the jury, minus only the percentage of fault which he contributed. As petitioner observed under the preceding question, where both petitioner and Haenn were at fault, it must then follow that petitioner is being required to pay Hawn for Haenn's fault, as well as its own. Under these circumstances, to permit Haenn to reimburse itself out of Hawn's recovery would be anomolous, for the very fund from which reimbursement would be realized is the product, in part, of Haenn's own fault.

For these reasons, it is appropriate that this Court review the question of first impression presented by this case as to the proper disposition of compensation payments made to an injured employee in the comprehensive pattern of rights and liabilities of all of the parties affected by the employee's injury.

III. The Question as to Whether the Shipowner Warrants the Vessel's Seaworthiness to an Employee of a Carpentry Contractor.

In *Seas Shipping Company* v. *Sieracki*, 328 U. S. 85, this Court held that a shipowner warrants the seaworthiness of his vessel and its appurtenances to an employee of a stevedore contractor engaged in loading and discharging the vessel's cargo. The decision below extends this doctrine to an employee of a carpentry contractor engaged in repairs and alterations to the vessel's fittings requisite to the carriage of a specialized cargo.

This extension of the *Sieracki* doctrine brings the Court below into direct conflict with the Court of Appeals for the Second Circuit, which has repeatedly refused to extend the *Sieracki* rule beyond the limitations placed upon it by this Court. The Second Circuit has refused, for instance, to extend the warranty of seaworthiness to an employee of a contractor engaged in cleaning a vessel's boilers: *Guerrini* v. *United States,* 167 F. 2d 352, 354, cert. den. 335 U. S. 843; or to a rigger employed by a repair contractor: *O'Connell* v. *Naess,* 176 F. 2d 138.

Many classes of contractors' employees board a vessel while she is in port to work upon her. Their relationship to the vessel varies as to continuity and intimacy, and as to the extent to which the services they perform were formerly discharged by members of the crew. It is vitally important that there be uniformity among the Circuits as to the duty which a shipowner owes to various categories of workmen.

It is therefore appropiate that the conflict referred to above, springing as it does from the interpretation of a decision of this Court, be resolved by a review of the question by this Court.

Conclusion

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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